

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,)	No. CV 13-1316-TUC-CRP
Plaintiff,)	ORDER
vs.)	
\$229,850.00 in U.S. Currency,)	
Defendant.)	
Robert and Debra Osborne,)	
Claimants.)	

The Government filed this forfeiture action pursuant to 21 U.S.C. §881(a)(6). (Complaint (Doc. 1)). The Claimants in this case, Dr. Robert Osborne and his wife Debra Osborne seek dismissal pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim, arguing that the Complaint is untimely. (Doc. 9). The Magistrate Judge has jurisdiction over this matter pursuant to the parties' consent. *See* 28 U.S.C. § 636(c). The Osbornes' Motion to Dismiss came on for oral argument on July 29, 2014. (*See* Transcript (Doc. 26)). For the following reasons, the Court converts the Motion to Dismiss to a motion for summary judgment and denies the motion.

BACKGROUND

On May 9, 2013, pursuant to the execution of a search warrant by DEA, FBI, HHS, and IRS, a total of \$229,850.00 in cash was seized from the master bedroom area of the

Osbornes' residence. (Complaint, ¶11). The government alleges that the cash represents proceeds from Dr. Osborne's practice that was operating in violation of the Controlled Substances Act, 21 U.S.C. §§ 846 and 841 and is subject to forfeiture pursuant to 21 U.S.C. §881(a)(6). (*Id.* at ¶¶13, 15). Neither Dr. Osborne nor his wife, who both reside at the residence, were arrested or incarcerated. (*Id.* at ¶14).

DISCUSSION

The Osbornes seek dismissal of this action on the ground that the Complaint is untimely filed by one day. The parties disagree about when the time for the government to file this action began to run: the Osbornes contend it should be when the Claim was received by the FBI mailroom in Phoenix, Arizona, on July 10, 2013, and the government contends it is when the claim was received by the appropriate official at the agency, here, the FBI Forfeiture Paralegal Specialist at the FBI field office in Phoenix, Arizona, who received the Claim on July 11, 2013.

STANDARD. The government has attached affidavits with internal exhibits to its Response to the Motion to Dismiss. To consider the government's attachments, the Court must treat the motion to dismiss as a motion for summary judgment under Rule 56 and provide the parties with "a reasonable opportunity to present all the material that is pertinent to the motion." Fed.R.Civ.P. 12(d); *see also San Pedro Hotel Co., Inc. v. City of Los Angeles*, 159 F.3d 470, 477 (9th Cir. 1998) (represented party who submits matters outside the pleadings and invites consideration of same has sufficient notice that the court may use them to decide the motion thus requiring conversion to a motion for summary judgment). At oral argument, when the Court addressed the issue of conversion to a motion for summary judgment in light of the government's attachments, counsel for the Osbornes stated that: "It is undisputed that...the agency [received the claim]...on the 10th. My argument is that's the effective date. I am, at this point, not challenging that someone in that agency really did stamp it on the 11th; I mean that seems to be what these affidavits are saying. My position is, so what[?] It doesn't matter...." (Tr. at p.12). Counsel went on to state that discovery about "how the FBI procedures work...." is not necessary for the legal issue presently before the Court unless the

1 Court decides otherwise. (*Id.*).

2 Summary judgment is appropriate when there is no genuine issue as to any material
3 fact and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). The party
4 seeking summary judgment “bears the initial responsibility of informing the district court of
5 the basis for its motion, and identifying those portions of [the record]...which it believes
6 demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477
7 U.S. 317, 323 (1986). The nonmoving party’s evidence is presumed true and all inferences
8 are to be drawn in the light most favorable to that party. *Eisenberg v. Ins. Co. of North*
9 *America*, 815 F.2d 1285, 1289 (9th Cir. 1987).

10 Only disputes over facts that might affect the outcome of the suit will preclude the
11 entry of summary judgment, and the disputed evidence must be “such that a reasonable jury
12 could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
13 242, 248 (1986). If the burden of persuasion at trial would be on the nonmoving party, the
14 movant may carry its initial burden of production under Rule 56(c) by producing, “evidence
15 negating an essential element of the nonmoving party’s claim or defense,” or by showing,
16 after suitable discovery, that the “nonmoving party does not have enough evidence of an
17 essential element of its claim or defense to carry its ultimate burden of persuasion at trial.”
18 *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1105-1106 (9th Cir. 2000).

19 **TIMELINESS.** The applicable forfeiture statute provides, in pertinent part that:

20 Any person claiming property seized in a nonjudicial civil forfeiture
21 proceeding under a civil forfeiture statute may file a claim with *the*
appropriate official after the seizure.

22 18 U.S.C. §983(a)(2)(A) (emphasis added). “Not later than 90 days after a claim has been
23 filed, the Government shall file a complaint for forfeiture....” 18 U.S.C. § 983(a)(3)(A). If
24 the government does not timely file a complaint for forfeiture or return the property prior to
25 expiration of the 90-day deadline, then the government “shall promptly release the
26 property...and may not take any further action to effect the civil forfeiture of such
27 property....” 18 U.S.C. §983(a)(3)(B).

28 The facts are not in dispute. On May 9, 2013, the government seized the Defendant

1 currency. On June 18, 2013, FBI Headquarters mailed Notice Letters to each of the
 2 Osbornes informing that the forfeiture was conducted pursuant to 21 U.S.C. §881, 19 U.S.C.
 3 §1602-1619, 18 U.S.C. §983, and 28 C.F.R. Part 8. (Response (Doc. 16), Exh. 1A). The
 4 Notice Letters also informed that:

5 If you want to contest the seizure or forfeiture of the property in court, you
 6 must file a claim of ownership with the FBI by July 23, 2013. *The claim is*
filed when it is received by the FBI Forfeiture Paralegal Specialist of the FBI
Field Division mentioned below.^[1]

7 (*Id.*) (emphasis added). Through counsel, the Osbornes submitted a Claim dated July 9,
 8 2013. (Response, Exh. 2A). The Osbornes sent the Claim by certified mail on July 9, 2014.
 9 (*Id.*) In their Answer and Motion to Dismiss, the Osbornes assert that the Claim was
 10 received by the FBI on July 10, 2013. (Answer, (Doc. 7) p. 3² (citing tracking number);
 11 Motion p. 1 (citing Answer)). The government does not dispute that the Claim arrived at the
 12 FBI mailroom on July 10, 2013. (*See* Response (Doc. 16), p. 1 (indicating the FBI mailroom
 13 in Phoenix, Arizona, received the Claim on July 10, 2013 according to the U.S. Postal service
 14 tracking number indicated in the Answer)). Rather, the government contends that the Claim
 15 was not received by the “appropriate official” (*i.e.* the FBI Forfeiture Paralegal Specialist)
 16 until July 11, 2013. Thus, the government contends it had 90 days from that date to file the
 17 Complaint.

18 The Claim bears a “received” date of 7/11/13 (the date appears to be hand written).
 19

20
 21 ¹The Osbornes were directed to
 22 Submit all documents to this FBI Field Division:
 23 SPECIAL AGENT IN CHARGE
 24 FEDERAL BUREAU OF INVESTIGATION
 25 21711 N. 7TH STREET
 26 PHOENIX, AZ 85024
 27 ATTN: FORFEITURE PARALEGAL SPECIALIST
 28 TELEPHONE NUMBER: 623-466-1819

(Response, Exh. 1A).

²The Answer states the Claim was received by the FBI on “July 10, 2014.” (Answer, p.3). Based on parties’ statements and the evidence of record, the Court presumes the date reflected in the Answer is a typographical error.

(Response, Exh. 2A). The government submitted the Declaration of FSA Data Analyst Brianne Johnson who states that she: stamped and dated the Osbornes' Claim on July 11, 2013; the day she stamped the Osbornes' claim, she was undergoing training by FBI Forfeiture Paralegal Specialist Christa Roberts who trained her to immediately open and date stamp incoming claims and petitions, then give them to either Roberts or the other Forfeiture Paralegal Specialist; and standard procedure is to date stamp the claims on the day they are received from the mailroom. (Response, Exh. 2). The government also submits the declaration of Christa Roberts, FBI Forfeiture Paralegal Specialist, who confirms Johnson's statements regarding receipt of the Osbornes' Claim and dating it as received on July 11, 2013. (Response, Exh. 1). Roberts goes on to state that the FBI office has a large mailroom, staffed by two employees, that receives mail for distribution to FBI offices in cities throughout Arizona. (*Id.*). She states that "[t]here is always a delay from receipt of mail in the mailroom to delivery into the forfeiture mailbox, due to required security measures and sorting procedures for incoming mail.... It is not unusual for mail to be placed in the forfeiture mailbox late in the afternoon, or the following morning. As a result, often the Forfeiture Unit has a receipt date the day after mail was received from the mailroom." (*Id.* at ¶7). "Upon receipt from the mailroom, the Forfeiture Unit immediately opens and date stamps all incoming claims and petitions." (*Id.* at ¶6).

On October 9, 2013 (91 days after July 10, 2013 and 90 days after July 11, 2013), the government filed the civil complaint in this action. The Osbornes assert that the complaint is untimely filed pursuant to 18 U.S.C. § 983(a)(3)(A) because this civil action was filed later than 90 days after they filed their Claim given that their Claim was received by the FBI mailroom on July 10, 2013. The government counters that §983(a)(2)(A) requires that the claim be filed with the "appropriate official" and, therefore, the claim is not "filed" until received by that official, who in this case is the FBI Forfeiture Paralegal Specialist. The government also cites regulations indicating that with respect to a personal written notice of administrative forfeiture, such as that received by the Osbornes, "Appropriate official" means: "the office or official identified in the...personal written notice in accordance with [28

C.F.R.] §8.9.” 28 C.F.R. § 8.2. Pursuant to §8.9, the notice must: “State the identity of the appropriate official of the seizing agency and the address where the claim must be filed....” 28 C.F.R. §8.9(b)(2)(iv); *see also* 28 C.F.R. §8.10(a) (indicating the claimant must file a claim with the “appropriate official”). The government points out that the Notices sent to the Osbornes were clear that the “claim is filed when it is received by the FBI Forfeiture Paralegal of [sic] FBI Field Division....” (Government’s Supplemental Authority, Attachment 1 (Doc. 22-1), p. 2 (citing Response, Exh. 1)). According to the government, the claim was received by the “appropriate official” (*i.e.*, the FBI Forfeiture Paralegal Specialist) on July 11, 2013 and thus, the government had 90 days from that date to file the complaint. (*Id.* at p. 2). Alternatively, if the Court determines the Complaint is late, then the government requests equitable tolling.

In 2000, Congress enacted the Civil Asset Forfeiture Reform Act (“CAFRA”), 18 U.S.C. § 983, to provide increased protections for claimants. *United States v. Ritchie*, 342 F.3d 903, 910 n. 1 (9th Cir. 2003); *see also* Stefan D. Cassella, *The Civil Asset Forfeiture Reform Act of 2000: Expanded Government Forfeiture Authority and Strict Deadlines Imposed on All Parties*, 27 J.Legis. 97, 122-25 (2001) (“Cassella”). “The enactment of CAFRA was, in part, a reaction to the perception that there was some inequity in imposing strict deadlines and sanctions on property owners contesting civil forfeiture actions, while not imposing similar deadlines and sanctions on the government. The logic was that if property owners were required to file claims within a fixed period of time, and were made to suffer consequences for failing to do so, the government should face deadlines and suffer consequences as well.” Cassella, at pp. 122-25. CAFRA imposed the 90-day deadline for the government to file a complaint set out at 18 U.S.C. §983(a)(3)(A). The 90-day time limit is mandatory and “[t]he requirement that the Government release the seized property where it fails to file a timely complaint for forfeiture is the ‘sanction’ that CAFRA imposes for such failure.” *United States v. One 2007 Harley Davidson Street Glide Motorcycle*, 982 F.Supp.2d 634 (D.Md. 2013) (citing *United States v. Wilson*, 699 F.3d 789, 791 (4th Cir. 2012)). Moreover, because forfeitures are disfavored, forfeiture laws are strictly construed

1 against the government. *Ritchie*, 342 F.3d at 910.

2 The Osbornes argue that the government “ought not be able to manipulate the
3 deadlines to evade the delay reforms[]” enacted by CAFRA. (Motion, p. 5). The Court
4 agrees.

5 Not only must the government file a complaint no later than 90 days after receipt of
6 a claim, but a claimant must file a claim within a deadline as well. *See Beck v. United States*,
7 2011 WL 862952, *1 (D.Md. Mar. 10, 2011) (“The Government’s notice sets the deadline
8 for filing a claim for seized property, subject to the restriction that the deadline may not be
9 ‘earlier than 35 days after the date the letter is mailed.’”) (quoting 18 U.S.C. §983(a)(2)(B));
10 (*See also* Tr. at p. 15 (counsel for government confirming that Claimants had 35 days to file
11 a claim)). Here, the Osbornes did as instructed, and mailed their Claim pursuant to the
12 directions they received from the government.³ Roberts’ declaration makes clear that “[t]here
13 is always a delay from receipt of mail in the mailroom to delivery into the forfeiture
14 mailbox....” (Response, Exh. 1, ¶7). Yet, there is no objective means for a claimant to be
15 aware of and plan for such delay. Nor did the notice letter inform the claimant to send the
16 claim so that it would be timely received by the paralegal accounting for a delay of any
17 specified or unspecified period. In sum, “[t]he strict construction required of [section
18 983(a)(3)(A)]...is a two way street. Had claimant...been merely one day late in filing his
19 claim, no doubt the government would take the position that the claim would be barred—and
20 properly so.” *United States v. Funds in the Amount of \$314,900.00 in U.S. Currency*, CV 05-
21 3012 (N.D. Ill. December 21, 2005 Order, p. 4)(citing *In re Forfeiture of \$34,905.00 in U.S.*
22 *Currency*, 96 F.Supp.2d 1116, 1119 (D.Or. 2000) (DEA required to forfeit property where
23 claimant failed to file claim within statutory period)). At oral argument, counsel for the
24

25 ³Although the government relies on the regulation which identifies the “appropriate
26 official” as being the person specified in the notice, the regulation also states that the notice
27 must specify the address where the claim should be sent. 28 C.F.R. §§8.2, 8.9(b)(2)(iv).
28 Here, the Osbornes did as directed by mailing their Claim to the address listed in the notice.
That is all the regulation requires. The regulation does not state that the claim is filed only
when placed in the hands of the appropriate official.

1 government confirmed that if a claim arrived at the mailroom on last day for filing a claim
 2 and did not reach the appropriate official until the following day, the claim would be deemed
 3 untimely. (Tr. at pp. 15, 21). Thus, “a requirement that filing occurs only when a claim
 4 reaches ‘the appropriate official’ would wrest from claimants all control over timely filing,
 5 as they could only hope that whatever mailroom procedures the agency has in place would
 6 get their claim to the right person by the deadline.” *Beck*, 2011 WL 862952 at *4. The
 7 District Court for the Eastern District of Michigan, in holding that the claim is “filed” when
 8 received by the agency rather than a specific official, persuasively found the government’s
 9 position to the contrary

10 untenable because it would, as a practical matter, eviscerate the 90-day
 11 limitation period imposed on the Government. For example, as the
 12 Government acknowledged at oral argument, if a claim were received by the
 13 seizing agency, but then sat in the mailroom for two weeks before being
 delivered to the person handling the seizure, the 90-day period would be
 extended for two weeks. The same would be true if the person handling the
 seizure were out sick, on vacation, on maternity leave, etc.

14 *United States v. Funds from Fifth Third Bank Account*, 2013 WL 5914101, *7 (E.D. Mich.
 15 Nov. 4, 2013). Therefore, the court concluded that “the better interpretation is that a claim
 16 is filed when it is actually received by the seizing agency.” *Id.* (citing *United States v. Real*
 17 *Property Located at 475 Martin Lane, Beverly Hills, CA.*, 545 F.3d 1134, 1141 (9th Cir.
 18 1988) (when deciding that CAFRA authorized *ex parte* extensions of the 90-day deadline the
 19 court stated that “[i]f a claim is filed, the government then has ninety days from the date the
 20 claim was received by the seizing agency to file a civil complaint....”).⁴ Moreover, such a
 21

22 ⁴At oral argument counsel for the Osbornes explained:

23 [I]n the federal system, there are dozens and dozens of federal agencies in the
 24 forfeiture game. I believe that what CAFRA intended when they said the
 25 “appropriate official,” was basically send it to the right agency. If DEA takes
 26 it, you can’t send it to the Department of Justice. If the FBI takes it, and they
 27 want the action to go through the Phoenix office, you can’t send it to D.C. or
 28 Virginia or whatever....[T]hat makes sense, and that’s consistent with CAFRA,
 that these actions start right away, and the Government has a deadline they
 have to comply with.

(Tr. at p. 5).

1 conclusion is in line with the protections that CAFRA sought to provide for claimants by
 2 imposing statutory deadlines applicable to civil forfeiture procedures:

3 “[A]s a general rule, forfeitures are not favored by the law and statutes
 4 providing for forfeitures are strictly construed. Furthermore, the Court
 5 understands that the current statutory deadlines were meant to remedy the
 6 pre-CAFRA reality, in which statutory deadlines for the commencement of
 7 civil forfeiture proceedings were absent. “The enactment of CAFRA was, in
 8 part, a reaction to the perception that there was some inequity in imposing
 9 strict deadlines and sanctions on property owners contesting civil forfeiture
 10 actions, while not imposing similar deadlines and sanctions on the
 11 government.” *The purpose of the ninety-day time period in section 983, then,*
is to prevent the government from retaining property subject to forfeiture “for
an extended period without commencing a judicial action that will give the
claimant his day in court.”

12 *Funds from Fifth Third Bank Account*, 2013 WL 5914101 at *10 (quoting *United States v.*
 13 *\$39,480.00 in U.S. Currency*, 190 F.Supp.2d 929, 931-32 (W.D. Tex. 2002) (quoting
 14 Cassella, p. 122)) (emphasis added). Testimony before the House of Representatives
 15 regarding CAFRA indicated that: “if a person files a claim letter with the seizing agency, the
 16 U.S. Attorney would then have to file a civil forfeiture within 90 days of the receipt of the
 17 claim letter.” *Civil Asset Forfeiture Reform Act of 1997: Hearings on Bi-Partisan Bill to*
 18 *Provide a More Just and Uniform Procedure for Federal Civil Asset Forfeitures, before the*
 19 *Committee on the Judiciary, U.S. House of Representatives, H.R. 1835*, 105th Congress, 1st
 20 session (June 11, 1997) (statement of David B. Smith, on behalf of National Association of
 21 Criminal Defense Lawyers), <http://www.nacdl.org/Advocacy.aspx?id=14904>, or alternatively
 22 at, <http://www.justice.gov/jmd/civil-asset-forfeiture-reform-act-2000-pl-106-185>; *see also*
 23 Cassella, n. 247 (citing Smith’s testimony).

24 A finding that the claim is filed when it is received by the mailroom of the agency
 25 where the claimant is directed to send the claim is consistent with the purpose of CAFRA.
 26 Such a holding creates a definite and firm deadline that is easily measurable and verifiable
 27 by all parties. Should the government require an extension of the 90-day deadline due to
 28 delay in delivery from the agency’s mailroom to the paralegal, then the government may
 request an extension upon a showing of good cause. *See e.g.* 18 U.S.C. §983(a)(3)(A); 475
Martin Lane, 545 F.3d at 1141.

Further, the government's authority cited to support a contrary finding is not binding on this Court and is unpersuasive. Much of the authority cited by the government is premised on a 1916 decision from the Supreme Court in *United States v. Lombardo*, 241 U.S. 73 (1916). The *Lombardo* Court addressed the issue whether the failure to file a document with Commissioner General of Immigration in Washington, D.C., was justiciable in the state where the document should have been mailed or could only be prosecuted in Washington, D.C. The Court stated that "[f]iling...is not complete until the document is delivered and received....A paper is filed when it is delivered to the proper official and by him received and filed....Anything short of delivery would leave the filing a disputable fact, and that would not be consistent with the spirit of the act[]...." *Lombardo*, 241 U.S. at 76 (internal quotation marks omitted). *Lombardo*'s rule has become known as the physical delivery rule. See *Crump v. United States*, 282 B.R. 859, 862 (N.D. Ohio 2002). Additionally, the Second Circuit, citing *Lombardo*, has held in the context of the filing a claim between private parties for products damaged in shipping, that "a paper will not be considered 'filed' until it has been delivered and received by the party with whom it is to be filed." *Pathway Bellows, Inc. v. Blanchette*, 630 F.2d 900, 902 (2d. Cir. 1980). *United States v. \$7,696.00 in U.S. Currency*, 2013 WL 1827668, *4 (N.D. Iowa April 30, 2013) and *United States v. One GMC Yukon Denali*, (CV 03-6890-JTL at Doc. 12, p. 9) (C.D. Cal. Dec. 4, 2003), cited by the government rely on *Lombardo* and *Pathway Bellows* to conclude that the claim is filed when received by the Forfeiture Paralegal Specialist. However, this language is taken out of context. *Lombardo* and *Pathway Bellows, Inc.*, decided whether the place or date of mailing (*i.e.* the mailbox rule) was the triggering event, or whether receipt (*i.e.* the physical delivery rule) was the triggering event for "filing" a document. *Lombardo* and *Pathway Bellows* did not address the nuance presented here concerning whether the document was filed when received at the designated official's address or when the document actually reached that official's hands. Unlike the cases cited by the government, this Court declines to extend *Lombardo* and *Pathway Bellows* to the instant facts. Consequently, the Complaint in this action is untimely.

EQUITABLE TOLLING. In the event the Court finds that the Complaint is untimely, the government requests equitable tolling. (Response, pp. 4-5). The government cites one case applying the equitable tolling doctrine to §983(a)(3)(A), (*id.* (citing *\$39,480.00 in U.S. Currency*, 190 F.Supp. 2d at 932-33)), however, neither the government nor its cited authority specifically discuss whether equitable tolling is available under §983(a)(3)(A) in the first instance. The Osbornes argue that substantive limitations are not subject to equitable tolling. (Reply (Doc. 20), p. 6) (citing *Dada v. Mukasey*, 554 U.S. 1, 18 (2008) (in immigration context, substantive limitations are not subject to equitable tolling)). The Osbornes do not explain how §983(a)(3)(A) is a “substantive” limitation precluding equitable tolling.

“[W]hen a time period for filing is not jurisdictional, the requirement is subject to waiver, estoppel, and tolling.” *Burns v. U.S.*, 764 F.2d 722, 727 n.3 (9th Cir. 1985) (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982)) *cf.* *Holland v. Florida*, 560 U.S. 631, 645 (2010) (proceeding to determine whether equitable tolling was available under statute only after first noting that statute at issue was not jurisdictional)). The first question, then, is whether §983(a)(3)(A) is jurisdictional. The Fourth and Second Circuits have held that the provisions of §983 are is not jurisdictional. *See United States v. Vasquez*, __ F.3d __, 2014 WL 3637150, *4 (2nd Cir. 2014) (“[T]he provisions of § 983 are procedural rules for pursuing the forfeiture of seized assets, not conditions of subject matter jurisdiction.”) (inner quotation marks and citation omitted); *Wilson*, 699 F.3d at 797 (“we conclude that the 90-day deadline imposed in §983(a)(3) is not jurisdictional....”). For the following reasons, this Court agrees.

The Supreme Court has recently pointed out that

“the word ‘jurisdiction’ has been used by courts ... to convey ‘many, too many, meanings’” and “cautioned ... against profligate use of the term.” *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng’rs & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 558 U.S. 67, 130 S.Ct. 584, 596, 175 L.Ed.2d 428 (2009) (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 90, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998)). “Accordingly, the term ‘jurisdictional’ properly applies only to ‘prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction)’ implicating [the court’s adjudicatory] authority.” *Reed Elsevier [Inc., v.*

1 *Muchnick*], [599 U.S. 154, 160-61,] 130 S.Ct.[1237] at 1243 [(2010)] (quoting
 2 *Kontrick v. Ryan*, 540 U.S. 443, 455, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004)).
 3 The Court confessed that “[w]hile perhaps clear in theory, the distinction
 4 between jurisdictional conditions and claim-processing rules can be confusing
 5 in practice,” that we should “us[e] the term ‘jurisdictional’ only when it is
 6 apposite,” and that we should “curtail ... ‘drive-by jurisdictional rulings.’ ” *Id.*
 7 at 1243–44 (quoting *Steel Co.*, 523 U.S. at 91, 118 S.Ct. 1003); *see also*
 8 *Henderson [ex. Rel. Henderson v. Shields]*, 131 S.Ct.[1197] at 1202–07
 9 [(2011)] (holding that a veteran's failure to file a notice of appeal within the
 10 required 120-day period did not deprive the Court of Veterans Appeals of
 11 jurisdiction over his claim); *Reed Elsevier*, 130 S.Ct. at 1249 (holding that a
 12 copyright-registration requirement was not jurisdictional); *Union Pac. R.R.*,
 130 S.Ct. at 598–99 (holding that a settlement-conference requirement was not
 jurisdictional); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514–15, 126 S.Ct.
 1235, 163 L.Ed.2d 1097 (2006) (holding that a Title VII provision exempting
 employers with fewer than 15 employees was not jurisdictional); *Kontrick*, 540
 U.S. at 452–56, 124 S.Ct. 906 (holding that a bankruptcy rule governing timely
 amendments was not jurisdictional); *United States v. Cotton*, 535 U.S. 625,
 630–31, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002) (holding that sentencing in
 excess of a statutory maximum did not deprive the sentencing court of
 jurisdiction). *But see Bowles v. Russell*, 551 U.S. 205, 209–10, 127 S.Ct. 2360,
 168 L.Ed.2d 96 (2007) (holding that the statutory time for the taking of an
 appeal from a district court decision is jurisdictional).

13 *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 868 (9th Cir. 2011) (en banc), *overruled in part*
 14 *on other grounds by Albino v. Baca*, 747 F.3d 1162 (9th Cir.2014). *See also Wong v. Beebe*,
 15 732 F.3d 1030 (9th Cir. 2013) (en banc) (holding that statute of limitations of the Federal
 16 Torts Claims Act is not jurisdictional and may be equitably tolled), *cert, granted*, __ U.S.
 17 __, 134 S.Ct. 2873 (June 24, 2014).⁵ Thus, “[t]o ward off profligate use of the term
 18 ‘jurisdiction’, ...[the Court has] adopted a ‘readily administrable bright line’ for determining
 19 whether to classify a statutory limitation as jurisdictional.” *Sebelius v. Auburn Reg’l. Med.*
 20 *Ctr.*, __ U.S. __, 133 S.Ct. 817, 824 (2013) (quoting *Arbaugh*, 546 U.S. at 516). The Court
 21

22 ⁵The Supreme Court has recently granted a petition for writ of certiorari in *Wong*.
 23 *Wong*, __ U.S. __, 134 S.Ct. 2873 (June 24, 2014). Until the Supreme Court issues its
 24 decision, this Court remains bound by the Ninth Circuit's decision. *See e.g., United States v.*
 25 *Frank*, 956 F.2d 872, 882 (9th Cir.1992) (“In the absence of an intervening Supreme Court
 26 decision or an Act of Congress that nullifies Ninth Circuit precedent, we must adhere to the
 27 law of the circuit[.]”); *United States v. Post*, 607 F.2d 847, 851 n. 5 (9th Cir.1979) (noting
 28 that, although the Supreme Court had granted certiorari in a similar case, the court was bound
 to follow Ninth Circuit precedent until the Supreme Court ruled otherwise).

1 “inquires whether Congress has ‘clearly state[d]’ that the rule is jurisdictional; absent such
 2 a clear statement, we have cautioned, ‘courts should treat the restriction as nonjurisdictional
 3 in character.’” *Id.* (quoting *Arbaugh*, 546 U. S. at 515–516) (other citations omitted). “This
 4 is not to say that Congress must incant magic words in order to speak clearly. We consider
 5 ‘context, including this Court’s interpretations of similar provisions in many years past,’ as
 6 probative of whether Congress intended a particular provision to rank as jurisdictional.” *Id.*
 7 (quoting *Reed Elsevier*, 559 U.S. at 168)).

8 Generally, district courts have “original jurisdiction” over all civil actions brought by
 9 the United States, “[e]xcept as otherwise provided by Act of Congress....” 28 U.S.C. § 1345.
 10 With specific regard to forfeitures, district courts have original jurisdiction of actions “for
 11 the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise,
 12 incurred under any Act of Congress....” 28 U.S.C. § 1355(a). Here, the government alleges
 13 the Defendant currency is subject to forfeiture under the Controlled Substances Act, 21
 14 U.S.C. § 881(a)(6). “This provision contemplates that such forfeitures may be accomplished
 15 through either criminal or civil proceedings.” *Wilson*, 699 F.3d at 794 (citing 21 U.S.C.
 16 § 881(e)(1)). When the government “elects to proceed civilly, the procedural rules provided
 17 by 18 U.S.C. § 983 govern the proceeding.” *Id.*

18 Section 983 is entitled “General rules for civil forfeiture proceedings” and sets out,
 19 for example: the timing and manner in which the government must give notice to interested
 20 parties; the timing and manner in which a person with an interest in the seized property may
 21 file a claim, and the 90-day deadline for the government to file a complaint. Section 983 also
 22 contains provisions regarding representation of the claimant, burden of proof, the innocent
 23 owner defense, motions to set aside forfeiture, proportionality, civil fines, and restraining or
 24 protective orders. This Court agrees with the Fourth Circuit that “[i]n this statutory context,
 25 it readily appears that the provisions of § 983 are procedural rules for pursuing the forfeiture
 26 of seized assets. The subject matter jurisdiction for forfeiture is conferred by 28 U.S.C. §
 27 1355(a); the authority to forfeit is provided by 21 U.S.C. § 881(a)(6); and the rules of
 28 procedure for pursuing a civil forfeiture are provided by 18 U.S.C. § 983.” *Id.* at 795; *see*

1 *also Reed Elsevier*, 559 U.S. at 164 (registration requirement under Copyright Act was not
 2 jurisdictional where, *inter alia*, that requirement “is located in a provision ‘separate’ from
 3 those granting federal courts subject-matter jurisdiction over those respective claims”).

4 Additionally, the language of §983(a)(3)(A) further supports the conclusion that the
 5 statute is not jurisdictional. Nothing in §983(a)(3)(A) setting out the 90-day deadline for the
 6 filing of a complaint speaks to the court’s jurisdiction. *See Henderson*, __ U.S. __, 131 S.Ct.
 7 at 1204 (statute was not jurisdictional where, *inter alia*, the relevant provision “‘does not
 8 speak in jurisdictional terms nor refers in any way to the jurisdiction of the...’” court.)
 9 (quoting *Zipes*, 455 U.S. at 394). Although §983(a)(3) employs mandatory language in
 10 setting out the deadline requiring that the government “shall file a complaint...” not later than
 11 90 days after the filing of the claim, 18 U.S.C. §983(a)(3)(A), “that limitation is imposed *on*
 12 *the Executive Branch of government*, not as a condition of the *court’s authority*.” *Wilson*,
 13 699 F.3d at 795 (emphasis in original). Further, the Ninth Circuit has applied equitable
 14 tolling even when the statutory language specified that an action would be “forever barred”
 15 if not filed within the limitations period. *See Wong*, 732 F.3d at 1038-39 (holding that
 16 despite FTCA provision that an action not filed within the limitations period would be
 17 “forever barred”, the FTCA “does not contain such unusually emphatic language that we may
 18 infer congressional intent to limit the adjudicatory authority of the federal courts from that
 19 language”) (citing *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 616 F.2d 394, 396-407 (9th Cir.
 20 1980) (Clayton Act); *Partlow v. Jewish Orphans’ Home of Southern Calif.*, 645 F.2d 757,
 21 760-61 (9th Cir. 1981), *abrogated on other grounds by Hoffman-La Roche, Inc. v. Sperling*,
 22 493 U.S. 165, (1989)).

23 Section 983(a)(3)(A) is clear that the government’s failure to file a complaint during
 24 the 90-day deadline does not completely bar the government from forfeiture. Instead, the
 25 statute requires the government to “return the property *pending the filing of a complaint*....”
 26 18 U.S.C. §983(a)(3)(A). However, if the government does not file a complaint within 90
 27 days of the filing of a claim and does not return the property within that time, then the
 28 government “shall promptly release the property...and may not take any further action to

1 effect the civil forfeiture of such property....” 18 U.S.C. §983(a)(3)(B). “While Congress
2 undertook to provide a sanction for the failure to comply with its terms, in doing so, it did
3 not provide or suggest that the court loses subject matter jurisdiction as a result of
4 noncompliance.” *Wilson*, 699 F.3d at 795. Moreover, §983(a)(3)(A) also permits the
5 government to obtain an extension of the 90-day deadline upon a showing of good cause or
6 with agreement of the parties. 18 U.S.C. §983(a)(3)(A). The *Wilson* court persuasively
7 found the ability to seek an extension of the deadline “undercut[] any argument that the
8 deadline is jurisdictional. Congress does not typically allow an agreement of the parties to
9 define the scope of the district court's authority to hear a case.” *Wilson*, 699 F.3d at 795. In
10 sum, nothing about the language in §983(a)(3)(A) expresses “an inflexible rule requiring
11 dismissal whenever its clock has run.” *Holland v. Florida*, 560 U.S. 631, 634 (2010)
12 (internal quotation marks and citation omitted).

13 Nor does the legislative history suggest that §983(a)(3)(A) is jurisdictional. CAFRA
14 enacted the deadline to address the perception that there was some inequity in imposing
15 deadlines on claimants, while no similar deadlines or sanctions were imposed on the
16 government. However, while CAFRA imposes a deadline and sanction, there is no language
17 suggesting that the deadline is jurisdictional.

18 Further, there is no showing on this record that would support inferring “Congress’
19 intent...from the existence of a ‘long line’ of Supreme Court decisions ‘left undisturbed by
20 Congress’ that ‘treated a similar requirement as ‘jurisdictional.’” *Wilson*, 699 F.3d at 795-96
21 (quoting *Henderson*, ___ U.S. ___, 131 S.Ct. at 1203); compare *Bowles*, 551 U.S. at 206
22 (provision was jurisdictional where, *inter alia*, the Court had “long and repeatedly held that
23 the time limits for filing a notice of appeal are jurisdictional in nature.”). Here, there is no
24 line of Supreme Court decisions with regard to §983(a)(3)(A), nor have the parties cited to
25 any Supreme Court decisions addressing a similar statute. See *Wilson*, 699 F.3d at 796
26 (finding “no similar line of precedents with respect to §983(a)(3).”).

27 At bottom, there is no clear language suggesting that §983(a)(3)(A) is jurisdictional.
28 Nor do contextual considerations support the conclusion that the statute is jurisdictional.

1 However, determination that §983(a)(3)(A) is nonjurisdictional does not end the
 2 analysis as to whether the statute is subject to equitable tolling. Although “a nonjurisdictional
 3 federal statute of limitations is normally subject to a ‘rebuttable presumption’ in favor ‘of
 4 equitable tolling.’” *Holland*, 560 U.S. at 645-46 (quoting *Irwin v. Department of Veterans*
 5 *Affairs*, 498 U.S. 89, 95-96 (1990) and citing *Young v. United States*, 535 U.S. 43, 49
 6 (2002)), the presumption may be rebutted by showing that there is “‘good reason to believe
 7 that Congress did *not* want the equitable tolling doctrine to apply.’” *Socop-Gonzalez v.*
 8 *Immigration and Naturalization Service*, 272 F.3d 1176, 1188 (9th Cir. 2001) (quoting
 9 *United States v. Brockamp*, 519 U.S. 347, 350 (1997)) (emphasis in original).

10 The Supreme Court has determined equitable tolling is available where the statute at
 11 issue does not already afford a generously long limitations period, “does not contain
 12 language that is ‘unusually emphatic,’ ...does [not]...‘re-iterat[e]’ its time limitation[,],...and
 13 application of equitable tolling... [would not] affect the ‘substance’ of a petitioner’s claim.”
 14 *Holland*, 560 U.S. at 648 (distinguishing cases holding that equitable tolling was not
 15 available to various statutes at issue). Prior to CAFRA, there was no deadline for the
 16 government to file a complaint for judicial forfeiture. Through enactment of CAFRA,
 17 Congress imposed the 90-day filing deadline to address the pre-CAFRA perception that
 18 forfeiture proceedings favored the government. *See* Cassella, at p. 125. Although forfeitures
 19 are disfavored, Congress did not expressly state that the 90-day period was not subject to
 20 equitable tolling. Instead, the same provision that sets out the 90-day deadline also permits
 21 the court to extend that deadline upon a showing of good cause, 18 U.S.C. §983(a)(3)(A),
 22 which supports the conclusion that the 90-day deadline is subject to some flexibility.

23 “The Supreme Court has only found the *Irwin* presumption overcome when dealing
 24 with statutes containing ‘detail[ed] ... technical language’ and ‘explicit list[s] of exceptions,’
 25 *Brockamp*, 519 U.S. at 352, 117 S.Ct. 849 [(tax code)]; circumstances where equitable tolling
 26 ‘could create serious administrative problems,’ *id.*; areas of law where the running of a
 27 defined statute of limitations is of “special importance,” [*United States*] *v. Beggerly*, 524
 28 U.S. [38] at 49, 118 S.Ct. 1862 [(1998) (providing for a 12-year statute of limitations)]; or

1 statutes the Court previously interpreted as jurisdictional in nature, *see John R. Sand &*
 2 *Gravel Co. v. United States*, 552 U.S. 130, 128 S.Ct. 750, 755, 169 L.Ed.2d 591 (2008).”
 3 *Rouse v. United States Dep’t. of State*, 567 F.3d 408, 417 (9th Cir. 2009). Section
 4 983(a)(3)(A) is not at all similar to the statutes in *Brockamp* and *Beggerly*, and permitting
 5 equitable tolling would not change the substance of the government’s claim. *See e.g.*
 6 *Holland*, 560 U.S. at 657 (applying equitable tolling where the statute at issue “differ[ed]
 7 significantly from the statutes at issue in...” *Brockamp*, and *Beggerly*). Consequently, the
 8 doctrine of equitable tolling applies to §983(a)(3)(A).

9 Here, the government bears the burden of showing that equitable tolling should apply.
 10 *Espinoza–Matthews v. California*, 432 F.3d 1021, 1026 (9th Cir.2005). A party is entitled
 11 to equitable tolling where “he shows ‘(1) that he has been pursuing his rights diligently, and
 12 (2) that some extraordinary circumstance stood in his way’ and prevented the timely filing.”
 13 *Holland*, 560 U.S. at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).
 14 Equitable tolling is not warranted by “a garden variety claim of excusable neglect,”...such
 15 as a simple “miscalculation that leads a lawyer to miss a filing deadline.” *Id.* (internal
 16 quotation marks and citation omitted).

17 To support equitable tolling here, the government cites \$39,480.00 in U.S. Currency,
 18 190 F.Supp.2d at 932-33, where an incorrect date-stamp on the claim resulted in the
 19 government filing the complaint one day late. In tolling the 90-day deadline, the court found
 20 the government “acted diligently and in good faith in prosecuting the instant case.... If...the
 21 date-stamp...had been correct, the Government would have been in full compliance with the
 22 ninety-day limitations period. Instead, the Government’s good faith reliance on the
 23 [mistaken]...date-stamp caused it to miss the filing by one day.” \$39,480.00 in U.S. Currency,
 24 190 F.Supp. 2d at 932. Further, the delay did not prejudice the claimant who did not “assert
 25 she is under any specific hardship because of the seizure of the money, and an additional day
 26 is so inconsequential that it could not significantly exacerbate any difficulty.” *Id.* at 923-33.
 27 Additionally, the claimant did not show the merits of her claim were compromised, and
 28 “[s]he will still have her day in court.” *Id.* at 933.

1 Similarly, when the District Court for the District of Maryland rejected the
 2 government's contention that the 90-day deadline commenced based on the date the claim
 3 reached the "appropriate official" instead of the date the claim reached the agency, the court
 4 also relied on the factors set out in *\$39,480.00 in U.S. Currency* when ordering further
 5 briefing on the issue of equitable tolling: "Equitable tolling here requires the Court to weigh
 6 the prejudice caused to [claimants] by tolling the deadline against the prejudice caused to the
 7 Government by requiring strict construction of §983." *Beck*, 2011 WL 862952 at * 5. The
 8 court went on to note that although the claimants may experience significant delay, they
 9 "would still [be] afford[ed] the opportunity to dispute merits of the seizure after the
 10 Government files its complaint....The Court notes that there is a 'strong preference for
 11 resolving disputes on the merits when possible, instead of determining the outcome solely
 12 on technical or procedural grounds." *Id.* (citing *\$39,480.00 in U.S. Currency*, 190 F.Supp.2d
 13 929, 933 (W.D. Tex. 2002)). "The Court must also consider whether the Government acted
 14 in good faith...." *Id.* Likewise, the District Court for the Southern District of Ohio applied
 15 the test set out in *\$39,480.00 in U.S. Currency* to equitably toll the 90-day deadline when the
 16 government's complaint was untimely because the government had mistakenly rejected the
 17 claimant's claim. *United States v. Thirty-Four Thousand Nine Hundred Twenty-Nine Dollars*
 18 *and 00/100 Dollars (\$34,929.00) in United States Currency*, 2010 WL 481250 (S.D. Ohio
 19 Feb. 5, 2010) (citing *United States v. \$114,143.00 in United States Currency*, 609 F.Supp.
 20 2d 1321 (S.D. Fla. 2009)).

21 The Ninth Circuit has made clear "that the purpose of the equitable tolling doctrine
 22 'is to soften the harsh impact of technical rules which might otherwise prevent a good faith
 23 litigant from having a day in court.' Equitable tolling also serves to 'prevent the unjust
 24 technical forfeiture of causes of action.'" *Harris v. Carter*, 515 F.3d 1051, 1055 (9th Cir.
 25 2008) (quoting *Jones v. Blanas*, 393 F.3d 918, 928 (9th Cir.2004)). Here, there is a lack of
 26 clear, consistent, and binding authority as to when the 90-day period to file a complaint
 27 commences. *See e.g. Dempsey v. Pacific Bell Co.*, 789 F.2d 1451, 1453 (9th Cir. 1986)
 28 (considering lack of clear precedent as factor in equitable tolling analysis). The government

1 has cited cases supporting the conclusion that the §983(a)(3)(A)'s 90-day period begins when
2 the claim is received by the Forfeiture Paralegal Specialist. (See Response, pp. 2-3 (citing
3 \$7,696.00 in U.S. Currency, 2013 WL 1827668 at *4; *United States v. Eight Hundred*
4 *Thousand Twenty-Seven Dollars and Seventy Cents*, 2005 WL 6967051 (D.D.C. Mar. 30,
5 2005); *United States v. GMC Yukon Denali*, CV 03-6890 -JCL (CDC Dec. 4, 2003 Order)).

6 Had this Court adopted the government's position over the Osbornes' argument, then the
7 Complaint in this matter would have been timely. In light of the unsettled law on this issue,
8 this case does not involve garden variety neglect or mere negligent miscalculation. Instead,
9 the record supports the conclusion that the government diligently calculated the statutory
10 deadline for filing relying on the date-stamp of July 11, 2013. The government did so based
11 on its interpretation and reliance on the pertinent statutory provisions and regulations.
12 Moreover, case law exists to support the government's interpretation. Given the
13 government's diligence and the extraordinary circumstance of the unsettled law on this issue,
14 the Court concludes that the government is entitled to equitable tolling. Nor have the
15 Osbornes shown that the one-day delay is significant or prejudicial. Tolling the deadline still
16 affords Claimants the opportunity to dispute the merits of the seizure. "In contrast to the lack
17 of prejudice to the claimants, dismissal of the Government's complaint would have a
18 draconian effect on the Government's case. Granting the Motion to Dismiss would force the
19 Government to release the Respondent Property and bar it from any further action to effect
20 the civil forfeiture of that property." \$39,480.00 in U.S. Currency, 190 F.Supp. 2d at 932
21 (citing 18 U.S.C. §983(a)(3)(B)). Such a result is especially harsh in light of the minimal
22 delay and the government's diligent attempt to file the complaint within what it deemed to
23 be the statutory period. Concluding otherwise overlooks the "strong preference for resolving
24 disputes on the merits when possible, instead of determining the outcome solely on technical
25 or procedural grounds." *Id.*; cf. *Harris*, 515 F.3d at 1055.

26 The Osbornes point out that the government did not have to wait to file the Complaint
27 until what it thought was the last day. (Reply, p.7). Regardless, had the this Court adopted
28 the government's position, the Complaint would have been timely. In a further attempt to

1 show the government did not act in good faith, the Osbornes point out that although the
2 Complaint was filed with the Court on October 9, 2013, it was not served until January 13,
3 2014. (Motion, p.5). The Osbornes also assert that the government did not serve them with
4 magistrate judge election form in a timely manner. The government correctly points out that
5 service was timely made within the 120 days allowed under Rule 4 of the Federal Rules of
6 Civil Procedure. The government further states that the magistrate judge election form is not
7 due until 14 days after entry of counsel's appearance, and the government served the form
8 at the time it served the Complaint. The Osbornes have not argued that the Complaint was
9 untimely served under the Rules. Moreover, the issue of service of the election forms is a
10 collateral matter that has no bearing on the instant analysis.

11 CONCLUSION

12 For the foregoing reasons, the Complaint in this matter is untimely filed by one day.
13 However, the doctrine of equitable tolling properly applies to excuse the late filing.
14 Accordingly,

15 IT IS ORDERED that Claimants' Motion to Dismiss (Doc. 9), converted to a Motion
16 for Summary Judgment, is DENIED.

17 IT IS FURTHER ORDERED that this matter is SET for a status conference on
18 **WEDNESDAY, OCTOBER 22, 2014 AT 9:45 A.M.** If counsel wish to appear telephonically,
19 counsel should contact the undersigned's law clerk no later than 4:00 p.m. on October 21,
20 2014, with the number where counsel may be reached.

21 DATED this 25th day of September, 2014.

22
23 
24 **CHARLES R. PYLE**
25 **UNITED STATES MAGISTRATE JUDGE**
26
27
28